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In The Supreme Court of the United States

STATE OF CONNECTICUT and GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT,

Petitioners,

v.

ARNE DUNCAN, in his official capacity as Secretary of the United States Department of Education, and CONNECTICUT STATE CONFERENCE OF THE NAACP, INDIVIDUAL MINORITY PARENTS AND STUDENTS IN CT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

The State of Connecticut ("the State") brought this action in 2005 seeking no more and no less than timely judicial guidance as to its obligations under the No Child Left Behind Act ("the NCLBA"). Specifically, the State asked the district court to address whether the Secretary of Education ("the Secretary") could require the State to expend its own funds to comply with federal mandates. The State's suit raised precisely the same legal issue as a suit school districts had brought in Michigan months earlier.

The Secretary's response to the two suits was very different. Although the school districts had brought suit directly in district court and had not challenged the Secretary's interpretation of the NCLBA in administrative proceedings, the Secretary never challenged their claims on ripeness grounds. By contrast, in Connecticut, the Secretary argued that it was improper for the State to bring suit directly in district court and that—even though the Secretary's legal position was clear and would not change—the State could not obtain judicial review until it submitted to more administrative proceedings.

Not surprisingly, the two cases turned out very differently. The school districts had an answer from the district court on the merits of their legal claim within seven months and a 13-3 majority of the *en banc* Sixth Circuit—after ordering the Secretary to

brief the ripeness question he never raised—concluded that the school districts' case was ripe even though the Secretary affirmatively argued that the school districts' case *was less ripe than Connecticut's* because no state was involved.

By contrast, the Second Circuit concluded that Connecticut's claims were not prudentially ripe. In so holding, the Second Circuit noted that its decision was directly contrary to the Sixth Circuit's but simply said—in a footnote—that it disagreed. Thus, there is a clear split between the Second and Sixth Circuits on the ripeness issue, which is representative of a larger split among the circuits on the presumption of judicial review of legal questions.

This Court should grant the State's petition to send a clear message that federal officials cannot impose arbitrary roadblocks to states' ability to obtain timely judicial review where there is a dispute as to their obligations under Spending Clause legislation. Allowing the Second Circuit's decision to stand will improperly skew the balance of power between the states and the federal government—the parties to Spending Clause contracts—where there are good faith disputes as to the meaning of Spending Clause legislation.

I. THE SECRETARY'S POSITION ON THE LEGAL QUESTION AT ISSUE IS FINAL AND SUBJECT TO REVIEW

The Secretary does not dispute that he—a cabinet-level official, and head of the United States Department of Education—has taken the clear legal position that the Unfunded Mandates Provision does not limit his ability to force the State to expend state funds to comply with unfunded federal mandates. Nor does he argue that his position on that legal issue will change. That is not surprising, given that both he and his immediate predecessor have steadfastly maintained that position since 2005, in the face of court challenges in the Second Circuit, the Sixth Circuit and the District of Arizona. His position is final for purposes of review.

The Secretary correctly notes that "[t]he APA, which provides the waiver of sovereign immunity that allows this suit to go forward, provides for review only of 'final agency action.'" *Brief for the Secretary of Education in Opposition*, p. 9 ("*Sec. Opp.*") (quoting 5 U.S.C. § 704). However, his view of what constitutes "final agency action" is inconsistent with both common sense and this Court's precedent, which dictates that the finality requirement be "interpreted . . . in a pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

"As a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett v. Spear*, 520 U.S. 154, 177 (1997). The first is that "the

action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948)). The second is that "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Both conditions are present here. There is no dispute that the Secretary, a cabinet-level official and the head of the United States Department of Education, has taken the position throughout this litigation—and similar litigation elsewhere—"that states and local educational agencies must meet NCLB's conditions of assistance in order to receive federal funds under the Act, regardless of whether meeting those conditions of assistance would entail the expenditure of state and/or local funds." Answer to Plaintiffs' Complaint ¶6 (RA2); *see also id.*, ¶74 (RA3).

That satisfies the consummation requirement, as this Court recognized in *Abbott*, when it noted—in finding an agency's action final—that the agency's position was not "only the ruling of a subordinate official" and that the "Assistant General Counsel for Food and Drugs stated in the District Court that compliance was expected." *Abbott*, 387 U.S. at 150; *see also Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d

Cir. 2008) (holding that "an unequivocal statement of the agency's position is sufficient to meet the first requisite for final agency action." (quotations omitted)); *Student Loan Assoc. v. Riley*, 104 F.3d 397, 405-06 (D.C. Cir.), *cert. denied*, 522 U.S. 913 (1997) (holding that the Secretary of Education's position was final for purposes of review where he had "endorsed" that position and had "stood by the Department's interpretation").

The Secretary's interpretation also determined the State's rights and obligations under the NCLBA. *Bennett*, 520 U.S. at 177. The Secretary made abundantly clear before and during this litigation that Connecticut was obligated to comply with all conditions he imposed and that the State had no right to object based on the insufficiency of federal funding. Answer ¶6 (RA2); *see Abbott*, 387 U.S. at 150 (holding that agency action was final, and relying in part on agency's statement during litigation that "compliance was expected"). Thus, his unequivocal and unwavering position impacts "the legal regime" to which the State is subject and the State can obtain judicial review of that position. *Bennett*, 520 U.S. at 178.

The gravamen of the Secretary's finality argument in his brief in opposition is that although his legal position is clear and unwavering and established the ground rules to which the State is subject, it is not final for APA purposes because the Secretary did not make a formal ruling on the issue. *Sec. Opp.*, p. 9. However, this Court has made clear

that "[t]he bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (citations omitted). Rather, it is "in the word 'final,' which requires that the action under review 'mark the consummation of the agency's decisionmaking process.'" *Id.* (quoting *Bennett*, 520 U.S. at 177-178).

There is no question that the Secretary's position "marks the consummation of the agency's decisionmaking process" on the interpretation of the Unfunded Mandates Provision and established the State's obligations under the NCLBA. The Secretary cites no authority holding—or even indicating—that his position is not final, and this Court should not deny review on that basis. *Id.*

II. THERE IS A CLEAR SPLIT BETWEEN THE SECOND AND SIXTH CIRCUITS ON WHEN CHALLENGES TO THE NCLBA ARE RIPE

The Secretary argues—and the Second Circuit concluded—that "[w]ithout some factual development in connection with a concrete submission, . . . the legal question presented has such an abstract quality that it would be exceedingly difficult for a court to arrive at the correct resolution." *Sec. Opp.*, p. 11. The Sixth Circuit reached precisely the opposite conclusion. Thus, there is a clear split between the

Second and Sixth Circuits on when challenges to the NCLBA are ripe. The proceedings in the Sixth Circuit conclusively demonstrate that the Sixth Circuit is on the right side of that split, and this Court should reverse the Second Circuit's decision.

Months before the State filed this suit in 2005, school districts in Michigan filed a suit raising the same straightforward legal issue. Even though there had been no administrative proceedings, the Secretary raised no concern as to ripeness and the district court did not find it "exceedingly difficult" to address "the legal question presented." *Sec. Opp.*, p. 11. Indeed, the district court ruled in the Secretary's favor within seven months.

The Sixth Circuit likewise had no difficulty addressing the legal issues presented despite the lack of any factual development in that case and, again, the Secretary did not raise a ripeness issue. Indeed, the ripeness issue would not have come up at all in the Sixth Circuit had the *en banc* court not raised it *sua sponte*. When the *en banc* court finally did raise it, the Secretary affirmatively argued that the Sixth Circuit *"case was 'less fit for review' than the* Connecticut v. Spellings *case because, unlike in that case, no State is a party here." Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 300 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (McKeague, J., concurring) (emphasis added).

An overwhelming 13-3 majority of the *en banc* Sixth Circuit held that the *Pontiac* case—which the

Secretary conceded was less ripe than this case—was ripe. The Second Circuit expressly "disagree[d]" with the Sixth Circuit's decision and held that the State's claims were not. *Pet. App.* 15 n.4. That created a clear circuit split, warranting this Court's review.

The Secretary acknowledges that "a number of judges on the en banc Sixth Circuit found a similar NCLB challenge ripe for judicial review," *Sec. Opp.*, p. 14, but seeks to minimize the significance of that split, arguing that because the Sixth Circuit was equally divided, "the precedential effect of [its] disposition with respect to the particular issue of ripeness is unclear." *Id.* at 11. However, that ignores reality.

As an initial matter, the Sixth Circuit and courts in other circuits have relied on the *Pontiac* decision, which indicates that it does, in fact, have precedential effect. *See, e.g.*, *Kindle v. City of Jeffersontown*, 374 Fed. Appx. 562, 570 (6th Cir. 2010) (unpublished) (citing *Pontiac* in indispensable party analysis); *HDR Eng'g, Inc. v. R.C.T. Eng'g, Inc.*, 2010 U.S. Dist. LEXIS 67690, at *12 (S.D. Fla. June 15, 2010) (similar). Moreover, regardless of any limitations on the technical precedential effect of the *en banc* Sixth Circuit's decision, other courts facing this issue—and similar issues—will not lightly ignore the views that thirteen respected circuit judges (enough to staff more than four typical circuit panels) expressed in the high-profile *Pontiac* case.

Indeed, the Second Circuit's decision in this case is fatal to the Secretary's argument. The Second Circuit did not question the precedential effect of the *en banc* Sixth Circuit's decision. Rather, the Second Circuit "disagree[d]" with the Sixth Circuit's decision on its merits, albeit with practically no analysis. *Pet. App.* 15 n.4. That demonstrates that, contrary to the Secretary's argument that review is not necessary because of the purportedly limited precedential effect of the *en banc* Sixth Circuit's decision, this clear circuit split will lead to more confusion in the lower courts if this Court allows it to stand.

III. THE SECOND CIRCUIT'S DECISION UNDERMINES STATE SOVEREIGNTY, CONTRARY TO THIS COURT'S SPENDING CLAUSE DECISIONS

The Secretary makes no effort to rebut the State's argument that the Second Circuit's decision is inconsistent with this Court's Spending Clause decisions. *Pet.*, p. 23-33. That is presumably because he recognizes that this Court's Spending Clause jurisprudence provides no basis for his argument that sovereign states seeking neutral judicial guidance as to what—under this Court's precedent—is effectively a contractual dispute must submit to a futile and costly administrative process controlled by the other party to that contract before they can have access to a court.

At its core, this case is about the degree of control all states accepting NCLBA funds, not just Connecticut, retain over their educational expenditures. The Secretary believes that once a state accepts NCLBA funds, it must comply with any and all requirements imposed by the Secretary even if the federal government does not provide sufficient funds to cover the expenses and, as a result, the state is forced to divert state funding to cover the shortfall. By contrast, the State believes that the Secretary can dictate only what the federal government funds and that to the extent the funding is insufficient, the State retains the ability to decide how to spend its own money.

There is no question that this dispute impacts core principles of federalism. As this Court recently recognized in an analogous context, "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2593-94 (2009).

Nor can there be any reasonable question that the State has a good faith basis to believe that its position is legally correct. A majority of the judges to address the issue on the *en banc* Sixth Circuit—the only court to reach the merits of the parties' claims—concluded that "the district court, this

Court's prior panel majority, . . . the panel dissent [and the former Secretary of Education] have all interpreted [the Unfunded Mandates Provision] differently," and that "the only thing clear about [the Unfunded Mandates Provision] is that it is unclear." *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 277 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (opinion of Cole, J., joined by Martin, Daughtrey, Moore, Clay, Gilman and White, J.J.). Therefore, the NCLBA did not provide clear notice to the states that they have to spend non-NCLBA funds to comply with the Act's requirements. *Id.*

Given the Secretary's clear and unwavering position on this legal question with significant financial consequences for the State, the State brought suit in 2005 seeking timely judicial guidance as to its obligations under the NCLBA. At the time, there was no reason to believe further administrative proceedings were necessary. Indeed, when the State filed suit, the Secretary had already moved to dismiss the Michigan action—which the Secretary acknowledges was "similar" to this one, *Sec. Opp.*, p. 13—with nary a mention of the school districts' need to raise the legal question in administrative proceedings, or prove in administrative proceedings that the federal funds provided were, in fact, insufficient.

The Secretary has never explained why he permitted school districts in Michigan to obtain timely judicial review of their challenge to the

NCLBA, while demanding that the State of Connecticut submit to further administrative proceedings. Nor is any explanation evident. That arbitrary treatment is inconsistent with "the dignity and respect due sovereign entities." *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002).

It also demonstrates the hollowness of the Secretary's claimed need for administrative factfinding—if it was not necessary for the school districts, why is it necessary for the State? Indeed, it is difficult to see what the Secretary believes further administrative proceedings would accomplish, aside from further delaying judicial review of the Secretary's legal position. The Secretary has made clear that any administrative proceedings would be premised on the correctness of his legal position and he indicated below that no administrative factfinding would be necessary unless and until a "reviewing court" rules in the State's favor on the meaning of the Unfunded Mandates Provision. (RA5).

Connecticut—and, by extension, its citizens—has the right to obtain timely judicial review of the Secretary's legal position which determines the State's obligations under the NCLBA. There is no legal basis for the Secretary to delay that review by requiring further administrative proceedings that will do nothing more than cost the State yet more money.

If this Court allows the Second Circuit's decision to stand, it will send the message to the Secretary—and

to the federal government generally—that federal officials are free to impose arbitrary administrative roadblocks to states' attempts to obtain neutral judicial guidance regarding their obligations under Spending Clause legislation. That is inconsistent with the federalism principles underlying this Court's Spending Clause decisions, as well as decisions by the Fifth, Sixth and D.C. Circuits more broadly recognizing a presumption of reviewability where legal questions are raised. *Pet.*, p. 16-33. This Court should grant review to preserve the states' ability to obtain timely and meaningful judicial guidance as to their obligations under Spending Clause legislation.

CONCLUSION

For all of the foregoing reasons, and those set forth in its Petition, the Petitioner respectfully submits that this Court should grant this Petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, Plaintiffs, v. MARGARET SPELLINGS, SECRETARY OF THE DEPARTMENT OF EDUCATION, Defendant.	Civil No. 3:05-cv-01330 (MRK) February 26, 2007

ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT, FOURTH CAUSE OF ACTION

Defendant Margaret Spellings, Secretary of the Department of Education ("the Secretary"), hereby presents her answer to the allegations of Plaintiffs' Second Amended Complaint, insofar as those allegations may be re ant to Plaintiffs' Fourth Cause of Action (Plaintiffs' first three causes of action having been dismissed from this litigation).

First Defense

Plaintiffs' Fourth Cause of Action and related allegations fail to state a claim for which relief can be granted.

Second Defense

The Secretary answers the numbered paragraphs of Plaintiffs' Second Amended Complaint as follows:

1. Deny.

2. The first sentence is too imprecise for the Secretary to formulate a response. The Secretary lacks sufficient knowledge to admit or deny the second sentence.

3. Admit the first sentence, except to aver that the Act was signed into law on January 8, 2002. Deny the second and third sentences.

4. The Secretary lacks sufficient knowledge to admit or deny the allegations in this paragraph.

5. Deny the first sentence, except to admit that section 9527(a) of the No Child Left Behind Act ("NCLB"), as codified at 20 U.S.C. § 7907(a), contains the excerpted language without the added emphasis. Deny the second sentence,

6. Deny, except to admit that Defendant Secretary of Education Margaret Spellings, an officer of the federal government, contends that states and local educational a[illegible]ies must meet NCLB's conditions of assistanc[illegible]rder to receive federal funds under the Act, regardless of whether meeting those conditions of assistance would entail the expenditure of state and/or local funds.

7. Admit.

8. The Secretary lacks sufficient knowledge to admit or deny the allegations in this paragraph,

except to deny the characterization of NCLB's conditions of assistance as "mandates."

9. The Secretary lacks sufficient knowledge to admit or deny the allegations in this paragraph.

10. Admit the first sentence, except to deny the characterization of NCLB's conditions of assistance as "mandates." Deny the second sentence, except to admit that Connecticut

* * *

Secretary to state the consequences of not participating in the ESEA. Deny the third sentence, but aver that the Secretary informed Utah that rejection of Title I, Part A funds would result in serious consequences to other programs with allocations that are driven in part by Title I, Part A. Deny the fourth sentence.

68. Deny, except to admit that Connecticut would lose its Title I, Part A funds and Title I, Part A—based federal education funds if the State chose not to participate in Title I, Part A.

69. Deny, except to admit that the General Education Provisions Act allows the Secretary to withhold from Connecticut some or all of the funds that Connecticut receives under Title I, Part A if the State does not comply substantially with NCLB conditions of assistance applicable to Title I, Part A and/or its own assurances.

70. Admit, except to deny that NCLB gives 20 U.S.C. § 7907(a) the title of "Unfunded Mandates Provision," or that the added emphasis is contained in the statute.

71. Deny, except to admit that the IASA (the 1994 reauthorization of the ESEA) included a provision with the same language as 20 U.S.C. § 7907(a).

72. Deny.

73. The Secretary lacks sufficient knowledge to admit or deny the allegations in this paragraph.

74. Deny, except to admit that the Secretary interprets NCLB to require states and local educational agencies to meet the Act's conditions of assistance in order to receive federal funds under the Act, regardless of whether meeting those conditions of assistance would entail the expenditure of state and/or local funds.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, Plaintiffs, v. MARGARET SPELLINGS, SECRETARY OF THE DEPARTMENT OF EDUCATION, Defendant.	Civil No. 3:05-cv-01330 (MRK) December 2, 2005

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)

* * *

In fact, however, this case is not ripe for judicial resolution under the Court's analysis in *Abbott Laboratories*. In contrast t the drug manufacturers' challenge in *Abbott Laboratories*, which presented a purely legal question, the State's claims present both legal and factual issues. The threshold question is a legal one: whether the NCLB excuses states from compliance with applicable conditions of assistance if states would be required to spend their own funds in order to comply. *See* Part III.A., *infra*. If the NCLB

does not excuse compliance, the State has no claim. If the reviewing court were to find that the NCLB *does* excuse compliance, however—*i.e.*, if the legal issue were resolved in the State's favor a highly complex factual question would be raised: whether the amount of federal funding provided is sufficient to enable the State to satisfy the annual testing requirements. This question would require not only a searching examination into the spending choices made by the State and the available alternatives, but also an understanding of the interaction between educational policy and pragmatic budgetary considerations. It cannot seriously be doubted that this question would benefit from further factual development and from application of the agency's expertise during the statutorily prescribed administrative review process, which would take place as a matter of course (*see* Part I.A., *supra*) following any attempt by the agency to initiate enforcement action under 20 U.S.C. § 1234c. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (even where "an allegedly injurious event is certain to occur," a court may properly "delay resolution . . . until a time closer to the actual occurrence of the disputed event when a better factual record might be available").

A second distinction between this case and *Abbott Laboratories* is the nature of the agency action challenged. In *Abbott Laboratories*, although no enforcement action had been . . .

* * *